Filed 4/1/10 In re J.G. CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re J.G. et al., Persons Coming Under the Juvenile Court Law.	
STANISLAUS COUNTY COMMUNITY SERVICES AGENCY, Plaintiff and Respondent, v. D.S., Defendant and Appellant.	F058557 (Super. Ct. Nos. 515518 and 515519) **OPINION**

APPEAL from a judgment of the Superior Court of Stanislaus County. Nancy B. Williamsen, Commissioner.

Catherine Campbell, under appointment by the Court of Appeal, for Defendant and Appellant.

John P. Doering, County Counsel, and Carrie Stephens, Deputy County Counsel, for Plaintiff and Respondent.

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INTRODUCTION

Appellant D.S. appeals from the findings of the Juvenile Court of Stanislaus County that he was the alleged father and not the presumed father of C.G.'s children, J1 and J2. Appellant argues he satisfied his burden of proving that he received the children into his home and he openly and publicly acknowledged paternity, even though he repeatedly told social workers he was not the children's father and he only acknowledged they were his children to a few family members. We will affirm.

FACTS

C.G. is the mother of seven children by at least three different men. She has never been married. The children range from the oldest, 17-year-old B., to the two youngest, J1 (born 2005) and J2 (born 2006).

In May 2009, the special investigations unit of the Stanislaus County Community Services Agency (respondent) received information that C.G. was committing welfare fraud. C.G., who was living in Modesto, was receiving public assistance and reported that none of the children's fathers were living in her home. However, respondent's investigators received information that appellant was the father of J1 and J2, he was living with C.G. and her children, C.G. was receiving public assistance to pay for a childcare provider, and appellant was watching the children and receiving the county's childcare money. The September 2007 rental agreement for the Modesto residence listed the occupants as appellant, C.G., J1, J2, and C.G.'s other children. In September 2008, C.G. filed a statement under penalty of perjury with Stanislaus County and declared appellant was her cousin, he did not live with her at the Modesto residence, and she only used his name for credit purposes to rent the house.

At 7:00 a.m. on May 20, 2009, respondent's investigators arrived at C.G.'s residence to investigate the welfare fraud report and verify who lived there, and they had a photograph of appellant. C.G. answered the door and said she was there with her six children[1] and her boyfriend, D. C.G. said D. did not live there, he just spent the night, and she did not know D.'s last name. Appellant appeared and investigators asked for his name. Appellant hesitated and falsely identified himself as D.M. The investigators advised appellant that they recognized him from his photograph and knew his true name. Appellant acknowledged his identity but said he lived with his parents in Riverbank, and he did not live with C.G. and the children. The investigators asked to check the bedroom, C.G. agreed, and they found a closet full of men's clothing.

The investigators asked if appellant was the father of any of C.G.'s children, and both C.G. and appellant said no. The investigators advised appellant and C.G. that they received information that appellant was the father of the two youngest children and asked if that was true. Appellant "insisted" he was not the father of any of the children. The investigators advised C.G. that her public assistance would be denied unless she added appellant to her case as a possible father. C.G. said she would do so.

Appellant's prior history

After completing the home visit, the investigators discovered appellant was possibly involved in the death of a young child a few years earlier. The investigators referred the matter to respondent to determine if child protective services should become involved to ensure the safety of C.G.'s children.

Respondent immediately conducted an investigation and learned the juvenile court previously found appellant inflicted fatal injuries on a child in 2004. The prior incident did not involve C.G. or any of her children. The incident occurred in July 2004, when

[1] C.G.'s oldest child, B., was living with his biological father.

appellant was living with his then-girlfriend, H.R., who was the mother of two-year-old M.F. Appellant was not M.F.'s father but he looked after the child. On July 2, 2004, appellant reported he was caring for M.F. while H.R. was not home. He was taking a shower when M.F. walked into the bathroom and slipped on the wet floor. Appellant reported that M.F. was knocked unconscious, he called 911, and he followed the operator's directions to place M.F. in cold water to wake her up. Appellant reported M.F. woke up and he cancelled the ambulance. When H.R. returned home, she noticed a dent in the bathroom wall which was higher than M.F.'s height. Appellant said he dented the wall because he slipped and fell as he got out of the shower to help M.F. H.R. took M.F. to the hospital and X-rays were normal.

On July 5, 2004, M.F. was again injured while appellant was caring for her by himself. Appellant reported that M.F. was napping but she started gurgling and had trouble breathing. When H.R. returned home, she saw a huge bump on M.F.'s forehead. An ambulance was called and M.F. was taken to the hospital. She was diagnosed with shaken baby syndrome. She had severe traumatic brain injury, severe bilateral retinal hemorrhaging due to severe shaking, and multiple unexplained bruises in different stages of healing on her body, chest, back, forehead, and right leg. A bruise on the back of her left thigh was in the shape of a handprint, and there were three apparent finger marks along with superficial fine red scratches. The physicians believed M.F.'s lethal brain injuries were inconsistent with appellant's story that she had slipped on a bathroom floor a few days earlier. Instead, the child's injuries were consistent with two separate incidents of abuse, and injuries of that magnitude usually occur from falling from one to two stories. On October 1, 2004, M.F. died from the severe brain injuries.

Appellant was arrested for inflicting M.F.'s fatal injuries, and a criminal complaint charged him with child abuse resulting in death (Pen. Code, § 273ab), infliction of injury on a child (Pen. Code, § 273d), and two counts of permitting a child to suffer under circumstances likely to cause great bodily injury or death (Pen. Code, § 273a, subd. (a).)

Appellant was released on bail. H.R. insisted appellant did not cause M.F.'s death, and H.R. remained in a romantic relationship with appellant throughout the pendency of the criminal case.

In May 2005, H.R. gave birth to appellant's child, A.S. In June 2005, respondent filed a dependency petition for A.S., which alleged appellant caused M.F.'s death, H.R. did not believe the allegations, appellant remained in the house, and A.S. was at risk of physical abuse because H.R. failed to show she would protect the infant.

In October 2005, the juvenile court found the petition was true and appellant was responsible for M.F.'s death from severe child abuse, and it denied reunification services to appellant for A.S.

On the same day the court denied reunification services to A.S., C.G. gave birth to J1.

In May 2006, the juvenile court terminated the parental rights of both appellant and H.R., and A.S. was subsequently adopted.

In July 2006, an information was filed against appellant charging him with multiple felony offenses arising from the infliction of child abuse resulting in M.F.'s death.

In August 2006, C.G. gave birth to J2.

In September 2007, C.G. and appellant entered into the lease to live at the Modesto residence with J1, J2, and C.G.'s other children.

In October 2007, the superior court dismissed the criminal charges filed against appellant for M.F.'s death. The instant record is silent as to the reasons for the court's decision to dismiss the charges.

The social workers' visit

After learning about appellant's prior history, social workers and a police officer visited C.G.'s residence on the evening of May 20, 2009, several hours after the investigators had been there to check on the welfare fraud report. Appellant answered the

door, and said C.G. was making a quick trip to the store and would be home soon. Appellant denied living at the residence, and said he was on the rental agreement so C.G. could qualify since he had good credit. Appellant denied that he gave a different name to the investigators earlier that day. Appellant admitted his belongings were in the house because he sometimes spent the night.

Appellant admitted he helped watch C.G.'s children but he was never alone with any single child, and the teenage children were always present if C.G. was not home. Appellant repeatedly stated that he did not understand that he could not be around children, because his criminal charges were dismissed and he was told to move on with his life. The social workers explained that a juvenile court's finding in a dependency matter was different from criminal charges, and the juvenile court found he physically abused M.F. and inflicted the child's fatal injuries.

Appellant denied that he was the father of C.G.'s youngest children, three-year-old J1 and two-year-old J2, and claimed he had only known the family for one year. Appellant "emphatically denied" that C.G. knew he had been implicated in the death of a child.

C.G. arrived home and said she knew about appellant's past, that he allegedly caused M.F.'s death, his parental rights were terminated for his own child, A.S., and the criminal charges were dropped. C.G. denied appellant was the father of any of her children. C.G. said the father of J1 and J2 was a different man who she met at a party, he had the same first name as appellant, and that man's name was not on the children's birth certificates. C.G. said she was not concerned about appellant, he was good with the children, and he did not live with them. C.G. said she had been dating appellant for a year and a half, but they had known each other for four to five years. C.G. also said that she met appellant after the criminal charges against him were dismissed.

As the meeting continued, both appellant and C.G. eventually stated that appellant was the father of J1 and J2. C.G. said appellant's name was not on the birth certificates because he refused to come to the hospital when the children were born.

The social workers also spoke with the six children in the house, who were clean and healthy. All the children referred to appellant as "dad." C.G.'s seven-year-old daughter said she had known appellant since she was five years old. C.G.'s fifteen-year-old daughter said she had known appellant for four or five years and she liked him.

The social workers noticed a tray of marijuana in the living room which was easily accessible to the children. C.G. said she did not use marijuana and the drugs belonged to appellant. C.G. and appellant agreed to work with respondent, and C.G. agreed not to let appellant in the house or visit the children.

On May 29, 2009, social workers visited C.G.'s oldest child, B., at the home where he lived with his biological father and stepmother. B.'s father and stepmother reported that B. sometimes visited C.G. and his half-siblings on the weekends. They believed C.G. and appellant had been living together for about a year and a half, appellant and C.G. partied in the garage and smoked marijuana, and C.G.'s oldest teenage daughter cared for her siblings. They also knew that a domestic violence incident occurred between C.G. and appellant a few years earlier, and C.G. had been involved in domestic violence incidents with a prior boyfriend.

On June 1, 2009, social workers were contacted by the stepmother of A., another of C.G.'s children. A.'s stepmother reported that she asked A. whether he was sad about not seeing appellant. A. said C.G. took all the children to visit appellant three or four times at the home of appellant's parents. A. also said that when the social workers were in the house and talking with appellant and C.G., an older sibling told the other children "to lie about what happens when they get in trouble," but A. did not get more specific.

The petition

On June 2, 2009, respondent took J1 and J2 into protective custody only as to appellant. The children were allowed to remain in C.G.'s house, but the social worker advised C.G. that dependency petitions would be filed as to all her children because of her relationship with appellant, and the children could stay with her only if appellant remained out of the house and had supervised visitation.

On June 4, 2009, respondent filed a petition in the Juvenile Court of Stanislaus County as to C.G.'s seven children, and alleged they were dependents within the meaning of Welfare and Institutions Code[2] section 300, subdivisions (b), (g), and (j). The petition stated that appellant was the alleged father of J1 and J2.

The petition alleged there was a substantial risk the children would suffer serious physical harm or illness as a result of the parent's inability to supervise or protect them, based upon the prior dependency proceedings in which the court found appellant caused M.F.'s death and terminated his parental rights to A.S., that appellant was living with C.G. and the children, appellant and C.G. repeatedly denied he was living there or was the father of J1 and J2, appellant denied C.G. knew anything about his prior history, C.G. admitted she knew about appellant's history, there was marijuana in the house within the children's access, and the stepmother of A. stated that C.G. continued to allow the children to be with appellant.

On June 5, 2009, the court detained J1 and J2 only as to appellant, allowed the children to remain with C.G., and provided for appellant to have supervised visitation. C.G. apparently claimed that paternity judgments existed as to J1 and J2, and appellant had acknowledged his paternity and provided financial support. C.G. also stated they

[2] All further statutory citations are to the Welfare and Institutions Code unless otherwise indicated.

were never married, she was not cohabitating with a man at the time the children were conceived, and paternity tests had not been done.

On June 23, 2009, respondent advised the court there were no existing court orders for the parentage of either J1 or J2.

Appellant's parentage statements

On June 30, 2009, appellant filed two separate JV-505 forms, entitled "Statement Regarding Parentage," for J1 and J2. The forms consist of a series of questions, optional answers which the declarant can check-mark, and sections for the declarant to write narrative answers. The forms for J1 and J2 were completed in someone's handwriting and signed by appellant.

In both forms, appellant checked the boxes that stated he believed he was the children's parent and requested the court enter parentage judgments. However, appellant made contradictory statements in each form as to C.G.'s residence and when they started living together. On the form for J1, appellant wrote that J1 lived with him from March 2009 to the present. Appellant wrote that at Christmas 2008, he told his parents, siblings, and aunt that J1 was his child, and his parents visited J1 "on weekends, while [C.G.] has lived in Hayward." Appellant wrote that he was aware of C.G.'s pregnancy and J1's birth, but he was not able to be present at his birth "due to circumstances." Appellant wrote that he had taken care of J1 and spent as much time as possible with him during the child's entire life. Appellant also wrote that C.G. and her children "lived in Livermore" with her aunt, appellant and C.G. decided to live together "full time" in March 2009, and C.G. moved to Modesto. Appellant further wrote that "circumstances have prevented me from being in the household full time," he was unemployed "during my trial" from 2004 to 2007, and he established a landscape business in 2008.

On the form for J2, appellant marked the box that the child had lived with him, but part of the answer was whited-out so that it read: "The child lived with me from ___ to present."[3] Appellant stated he told his parents, siblings, and aunt that J2 was his child at Christmas 2008. Appellant stated that he knew C.G. was pregnant, C.G. called him when J2 was born, and "due to circumstances, the criminal court process, I could not be with both of them as I would have wanted." "In April 2009, [C.G.] and I decided to live together full time. She moved to Modesto." Appellant also wrote that C.G. and J2 lived in Livermore with her aunt. Appellant again wrote that he was unemployed "during my trial, 2004-2007," but he started a landscaping business in 2008. Appellant further wrote that he had taken care of J2 as much as possible during the child's life and provided financial support during the past two years.

On July 9, 2009, the court set the matter for a contested jurisdiction/disposition hearing.

Respondent's report

On July 30, 2009, respondent filed the jurisdiction/disposition report. Both J1 and J2 were in C.G.'s custody, and they were in good health, well-behaved, and did not have any developmental problems. C.G. brought the children for weekly supervised visits with appellant. Appellant was always on time and engaged appropriately with the children. Both appellant and C.G. failed to appear for scheduled drug tests in June and July 2009.

Respondent believed the children would be safe in C.G.'s home as long as she recognized that appellant posed a risk to the children's physical well-being. However, C.G. told respondent, "'I understand the concern, but he is a good father. I couldn't ask for a better father.'" Respondent stated that C.G. did not understand that appellant's

[3] At the September 1, 2009, evidentiary hearing as to appellant's paternity, appellant's attorney stated he mistakenly whited-out part of the form and it was not an intentional deletion.

physical abuse of a child, which led to that child's death, disqualified him "from being considered a 'good' father."

Respondent recommended denial of reunification services to appellant pursuant to section 361.5, subdivision (b)(4).

> "It would appear that [appellant] lacks some reasonable judgment as he opts to father two children who were born within four months of each other while he [was] pending criminal charges related to the death of [M.F.]. Equally, [C.G.] opts to have two children with [appellant] despite her knowledge that he was accused of killing [M.F.] and knowing that he was not permitted by the Juvenile Court to raise [A.S.]."

Respondent further observed there was "an element of deception and secrecy" on appellant's part in attempting to have another family with C.G., and "[d]ishonesty appears to be a theme that [appellant] struggles with: denying his role in [M.F.'s] death, denying his paternity as it applies to [J1] and [J2], and being investigated for welfare fraud. [C.G.] appears to also have some complicity with regards to welfare fraud and deception as to [appellant's] paternity."

Respondent noted that combining "the challenges of [appellant's] violent history in killing [M.F.] and his and [C.G.'s] struggles with honesty creates a very difficult situation for the court and [respondent] to consider." C.G. was aware of appellant's history but she was committed to maintaining a relationship with him, with the plan that they would not spend time around the children. "This creates a situation that does not appear feasible or believable." Respondent recommended the children remain in C.G.'s home but subject to court supervision to make sure they were protected from "the danger [appellant] represents to the safety and wellbeing of her children."

Addendum Report

On August 19, 2009, respondent filed an addendum report to correct and clarify information in the prior report. Respondent reported that on July 1, 2009, appellant submitted an application for services with Sierra Vista Child and Family Services; C.G.

also requested services. Neither appellant nor C.G. appeared for their intake appointments. Respondent further reported that on July 24, 2009, it received a referral that C.G. and appellant were at Lake Tahoe with J1, J2, and three of their half-siblings. C.G. subsequently claimed they were at Lake Tahoe with appellant's parents, and the children denied they were with appellant.

Appellant's motion for an evidentiary hearing

On September 1, 2009, appellant filed a motion for the court to conduct an evidentiary hearing concerning the cause of M.F.'s fatal injuries. Appellant acknowledged that he was criminally charged with inflicting M.F.'s fatal injuries, and the juvenile court found he was responsible for M.F.'s fatal injuries and terminated his parental rights to his own child, A.S. However, appellant asserted that after the juvenile court's findings in A.S.'s dependency matter, appellant's defense attorney continued his investigation in the criminal case and obtained witness statements which cast doubt on appellant's alleged culpability for M.F.'s fatal injuries.

Appellant declared that as a result of materials submitted by the defense investigator "and other factors," the prosecutor in the criminal case "had serious questions" about appellant's guilt and requested the superior court dismiss the criminal charges against appellant. Appellant requested an evidentiary hearing for the juvenile court to consider matters that were not reviewed when the court terminated his parental rights to A.S. and found he was responsible for inflicting M.F.'s fatal injuries.

In support of his motion, appellant submitted reports compiled by a defense investigator about interviews with several witnesses regarding whether M.F.'s mother, H.R., inflicted the child's fatal injuries. A childcare provider who regularly cared for

M.F. stated the child was not afraid of appellant but the child was afraid of H.R., and this person believed H.R. was responsible for the child's injuries.[4]

The court's evidentiary hearing on presumed father status

On September 1, 2009, the court convened the joint jurisdiction/disposition hearing. The court reviewed appellant's motion for an evidentiary hearing as to the cause of M.F.'s death. The court noted appellant had not signed declarations of paternity when the children were born, he was not married to C.G., and it was not clear whether he was the presumed father of J1 and J2. The court stated:

> "It seems important to this Court in order to allow full and appropriate litigation, that if [appellant] wishes to participate in the jurisdiction portion of this hearing, the Court needs to determine whether or not he is, in fact, a presumed father or an alleged father, and I believe there is case law in support of a presumed father fully participating in these proceedings, but yet until they are presumed, their role is very limited."

The court decided to begin with an evidentiary hearing as to whether appellant was a presumed father before it conducted the jurisdiction hearing or considered evidence as to M.F.'s death.

Appellant acknowledged he had the burden of proof as to whether he was the presumed father, and called his father, Mr. S., as a witness on the issue. Mr. S. testified that appellant introduced J1 and J2 to Mr. and Mrs. S. and the rest of the family during Christmas 2008, and appellant told the family that they were his children. Mr. S. also believed C.G. told him sometime in 2007 that she had two children by appellant, and the conversation occurred while they were "in the other criminal trial."

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[4] In his brief, appellant declares the criminal charges for M.F.'s death were dismissed "when new evidence was discovered which indicated he was not responsible." While appellant's motion was supported by reports from the defense investigator which implicated M.F.'s mother, the instant record is silent as to whether the prosecutor moved for dismissal of the criminal charges, or the reasons why the court dismissed the multiple felony charges against appellant for M.F.'s death.

Mr. S. testified appellant lived with his parents "on and off" as an adult, but appellant had not lived with his parents for about two and a half years. Mr. S. admitted he told a social worker in May 2009 that appellant was living with him at that time. Appellant told Mr. S. that he was living with a friend, "Ricky," prior to May 2009. Mr. S. visited appellant in April or May 2009, but Mr. S. did not know the address and just knew appellant was in Modesto. Mr. S. did not know whether appellant had been living with C.G.

Appellant testified at the hearing that he believed he was the father of J1 and J2 because they looked like him, he had no reason to doubt they were his children, and he was intimate with C.G. during the relevant time period. Appellant denied C.G.'s claim that he refused to go to the hospital when J1 was born, and testified he just "got a phone call saying you have a son." Appellant was not aware C.G. was pregnant but he was not surprised he fathered a child with her.

Appellant testified he started living with C.G. and the children shortly before Christmas 2008. Appellant believed C.G. had been living at the Modesto residence for over three years. Appellant admitted he signed the lease but he did not recall the date. When confronted with the September 2007 lease, appellant conceded C.G. had only been living there for about a year.

Appellant testified he took all of C.G.'s children to visit his family during Christmas 2008, and he introduced J1 and J2 to his parents. He delayed the introduction because he did not know how to break the news to his parents.

> "Q. So you realize that [J1] was over the age of 3 when you finally introduced him to his grandparents, right?
>
> "A. Well, I never—first of all, I was never really involved with their life, per se, for [C.G.'s] sake, she asked that I not be. And in that meantime we started talking and reconciling and got back together and roughly after that I introduced them to my parents.

"Q. So you really only started getting involved in your children's lives in December 2008?

"A. Somewhere roughly around there."

Appellant testified he continued to live with C.G. and the children after the holidays and stayed with them until respondent removed him from the house.

Appellant testified he told everyone that J1 and J2 were his children. However, he did not tell H.R., his former girlfriend and mother of A.S., about J1 and J2. Appellant did not realize the juvenile court made the jurisdictional findings in A.S.'s case on the same day that J1 was born.

On cross-examination, appellant was asked about the paternity declaration forms he filed in this matter for J1 and J2. Appellant testified his father filled in the forms after they talked about the matter, and appellant signed the documents. Appellant was asked why the form for J2 stated that he decided to live full time with C.G. in April 2009, when he testified that he moved in with C.G. in December 2008. Appellant said he moved his belongings into C.G.'s house in December 2008, but he was not living there full time until April 2009. Appellant testified that prior to April 2009, he sometimes stayed with C.G. and "helped her out with whatever she needed, paid for the bills for the kids, food for the kids, clothes for the kids." Prior to April 2009, appellant lived "[w]herever I could find a bed" and lived on other people's couches.

Also on cross-examination, appellant was asked if he remembered when the welfare fraud investigators arrived at the Modesto house on May 20, 2009. Appellant testified he was not aware they were investigating welfare fraud allegations or whether he lived with C.G. "I remember somebody forcefully entering their way into my home and saying that I was going to be forced to pay child support for all the kids that were in the home, and that was that." Appellant also testified: "I got forcefully entered into my

home. My wife[5] was pushed to the ground. My children were pushed to the ground …."

Appellant denied that he gave a false name to the welfare fraud investigators because they already had his name and photograph when they arrived. Appellant did not recall telling the investigators that he did not live with C.G. or that he actually lived with his parents in Riverbank. Appellant testified the investigators just stood in the doorway and they never went into the bedroom or looked in the closet. Appellant testified he never told the investigations that he was not the father of J1 and J2.

Appellant testified that he remembered when social workers and police officers returned to the Modesto house several hours after the welfare fraud investigators. Appellant was furious because a social worker forcefully entered the house, scared the children, and they would not say what was going on. Appellant spoke to the police officers but he did not remember saying that he did not live with C.G. or that he was never alone with the children. Appellant also did not remember saying that he lived with his parents in Riverbank. Appellant admitted he gave his parents' telephone number as a contact number and also admitted he only went to his parents' house from time to time.

Appellant also called C.G. as a witness at the hearing as to whether he was the presumed father of J1 and J2. C.G.'s attorney immediately advised the court that C.G. "would like to exercise her amendment rights and not testify for this matter." The court was not sure "what right that would be." Appellant's attorney stated respondent's attorney "came over and just informed us that there is an ongoing investigation" for welfare fraud. The court was not sure whether any questions to C.G. would fall within a Fifth Amendment privilege, and called a recess so the parties could discuss an offer of

[5] Appellant admitted he was not married to C.G. but referred to her as his wife because "[w]e have that close of a relationship."

proof. After the recess, C.G.'s attorney stated she would testify and they would evaluate each question.[6]

C.G. testified she took J1 and J2 to visit appellant's parents during Christmas 2008, and appellant acknowledged they were his children in front of his parents, brother, in-laws, and a visiting friend. Appellant also acknowledged they were his children when asked by friends. C.G. refused to answer any questions as to when appellant moved into the house.

C.G. testified she occasionally saw appellant when she was pregnant with J1, but she did not tell appellant that he was the father. C.G. "texted" appellant from the hospital when J1 was born, and told him, "'You have a son.'" Appellant did not respond to the text message about the child until about a week later. C.G. occasionally saw appellant when she was pregnant with J2, and she told him that he was the child's father. C.G. called appellant when she was in labor with J2 because he was born two months early. C.G. testified she did not give appellant the opportunity to come to the hospital when J1 and J2 were born. Appellant did not ask which hospital she was admitted to, and she never volunteered the information. C.G. denied telling social workers that appellant refused to come to the hospital.

The court's findings

The court found appellant was an alleged father and he failed to meet his burden to prove he was the presumed father of J1 and J2.

"[P]resumed father status is not a transient commitment.

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[6] Appellant asserts respondent wanted to "limit evidence of appellant's involvement in the children's lives to deny him presumed father status" by telling C.G. "right before she testified that the welfare fraud investigation was active, leading her to invoke her Fifth Amendment right not to incriminate herself." As the record reflects, however, C.G. eventually took the stand and testified about her relationship with appellant.

"One must openly hold the child out as theirs, and what we have is [appellant] at best holding the child out to his relatives rather late, that being December of 2008, but yet to everyone else that the Court has heard from, that being the statements contained in the reports denying that he was their father.

"Also, [appellant's attorney] argues [appellant] had the children in his home because he was the lessee, so it was his house, but the reality is I think what [appellant] is trying to get the Court to believe is that he signed the lease. He didn't live there until—and it's a little confusing.

"At one time he says September of '08 and then he says he didn't live there until December of '08, so with the evidence he didn't live there until December of '08, so he moved into the mother's home, because even though he signed the lease, it was not his home.

"It also seems a bit incredible that he would live on other people's couches in a very transient relationship for a number of months after signing the lease, which was in 2007. But be that as it may, the evidence here is that he did not openly hold the children out to the community, and he only held them out to his family in December of 2008. And case law is clear that one must openly hold the children out and immediately come forward if one wants to be what's called a Kelsey S. Dad[7] immediately, and that certainly did not happen."

The court then conducted the joint jurisdiction/disposition hearing, and C.G. submitted the matter on respondent's report. The court found the children were dependents within the meaning of section 300, subdivisions (b), (g), and (j). Appellant objected to any findings being based on the section 300, subdivision (j) allegation that he abused a sibling (M.F.), and asked for a de novo hearing on that issue. The court replied appellant was an alleged father, he did not have standing on the jurisdiction issues, and it declined to consider appellant's motion for a de novo hearing on the cause of M.F.'s death.

[7] *Adoption of Kelsey S.* (1992) 1 Cal.4th 816 (*Kelsey S.*)

As for the dispositional order, appellant requested visitation with J1 and J2 and for the court to make a judgment of paternity. The court found appellant was an alleged father, there were concerns under the section 300, subdivision (j) allegation about his responsibility for M.F.'s death, "and it is on that basis that the Court finds clear and convincing evidence of substantial danger." The court placed the children in C.G.'s custody under respondent's supervision.

The court denied reunification services to appellant because he was the children's alleged father, but provided for appellant to have monthly supervised visitation with J1 and J2, and for appellant's parents to receive visitation at respondent's discretion. The court ordered a judgment of paternity to issue, with appellant as the father of J1 and J2.

On September 25, 2009, appellant filed a notice of appeal from the court's ruling of September 1, 2009, that he was not a presumed father, and denying reunification services.

DISCUSSION

Appellant contends the court abused its discretion when it found he was only an alleged father of J1 and J2 and not their statutorily presumed father or *Kelsey S.* father. Appellant asserts he publicly held out J1 and J2 as his children, any equivocation on that issue was brief and fleeting, and he financially supported C.G. and the children.

A. Presumed fathers.

A father's status is significant in dependency cases because it determines the extent to which the father may participate in the proceedings and the rights to which he is entitled. (*In re Christopher M.* (2003) 113 Cal.App.4th 155, 159.) "An alleged father is a man who may be the father of the child but who has not established biological paternity or presumed father status. [Citation.] A biological father is one whose paternity of the child has been established, but who has not established that he qualifies as the child's presumed father. [Citation.] A presumed father is one who meets one or more specified criteria

listed in [Family Code] section 7611 [citation]. [Citation.]" (*In re T.R.* (2005) 132 Cal.App.4th 1202, 1209 (*T.R.*).)

"Presumed father status ranks highest." (*In re Jerry P.* (2002) 95 Cal.App.4th 793, 801 (*Jerry P.*).) "... [O]nly a presumed, not a mere biological, father is a 'parent' entitled to receive reunification services under section 361.5," and custody of the child under section 361.2. (*In re Zacharia D.* (1993) 6 Cal.4th 435, 451; *Jerry P., supra,* 95 Cal.App.4th at p. 801.)

"'Presumed fatherhood, for purposes of dependency proceedings, denotes one who "promptly comes forward and demonstrates a full commitment to his parental responsibilities—emotional, financial, and otherwise[.]"' [Citations.] A presumed 'father's rights flow from his relationship (or attempted relationship) to the mother and/or child and not merely from his status as the biological father.' [Citation.] The presumed father's commitment to the child is a key consideration. [Citation.]" (*T.R., supra,* 132 Cal.App.4th at pp. 1209-1210.)

Family Code section 7611 sets forth several rebuttable presumptions under which a man may qualify as a presumed father: if he and the mother execute a voluntary declaration of paternity (§§ 7611, 7573); he marries the child's mother (§ 7611, subd. (a)); attempts to marry the child's mother (§ 7611, subds.(b), (c)); or "receives the child into his home and openly holds out the child as his natural child (§ 7611, subd. (d))." (*In re J.L.* (2008) 159 Cal.App.4th 1010, 1018 (*J.L.*).) "The statutory purpose [of Family Code section 7611] is to distinguish between those fathers who have entered into some familial relationship with the mother and child and those who have not. [Citation.]" (*In re Sabrina H.* (1990) 217 Cal.App.3d 702, 708; *T.R., supra,* 132 Cal.App.4th at p. 1209.)

"[A] man who has neither legally married nor attempted to legally marry the mother of his child cannot become a presumed father unless he *both* 'receives the child into his home *and* openly holds out the child as his natural child.' ([Family Code,] § 7611, subd. (d), italics added.) ….Therefore, to become a presumed father, a man who

has neither married nor attempted to marry his child's biological mother must not only openly and publicly admit paternity, but must also *physically* bring the child into his home." (*Adoption of Michael H.* (1995) 10 Cal.4th 1043, 1051, italics in original.)

Before the rebuttable presumption will arise, however, the alleged father has the burden of establishing by a preponderance of the evidence the foundational facts supporting his entitlement to presumed father status, that he received the children into his home and he openly and publicly acknowledged paternity. (*In re Spencer W.* (1996) 48 Cal.App.4th 1647, 1652-1653 (*Spencer W.*).) If the alleged father establishes the foundational facts, the presumption may be rebutted in an appropriate action only by clear and convincing evidence. (*T.R., supra*, 132 Cal.App.4th at p. 1210; *In re Nicholas H.* (2002) 28 Cal.4th 56, 63.)

On appeal, we review the juvenile court's determination of presumed father status under the substantial evidence standard. (*Charisma R. v. Kristina S.* (2009) 175 Cal.App.4th 361, 368-369; *Miller v. Miller* (1998) 64 Cal.App.4th 111, 117-118; *Spencer W., supra*, 48 Cal.App.4th at p. 1650; cf. *In re Kiana A.* (2001) 93 Cal.App.4th 1109, 1116 [determination of presumed father status reviewed under abuse of discretion standard.) "[W]e review the facts most favorably to the judgment, drawing all reasonable inferences and resolving all conflicts in favor of the order. [Citation.] We do not reweigh the evidence but instead examine the whole record to determine whether a reasonable trier of fact could have found for the respondent. [Citation.]" (*Spencer W., supra*, 48 Cal.App.4th at p. 1650.)

Appellant and C.G. were never married and never attempted to marry, his name was not on the birth certificates for J1 and J2, he never signed declarations of paternity when the children were born, and there is no evidence that DNA tests were conducted to determine his biological paternity. As such, the court correctly found in the first instance that appellant was an alleged father.

Appellant's claim to presumed father status was based on Family Code section 7611, subdivision (d), that he received J1 and J2 into his home and openly held them out as his natural children. In determining the existence of the foundational facts, "courts have looked to such factors as whether the man actively helped the mother in prenatal care; whether he paid pregnancy and birth expenses commensurate with his ability to do so; whether he promptly took legal action to obtain custody of the child; whether he sought to have his name placed on the birth certificate; whether and how long he cared for the child; whether there is unequivocal evidence that he had acknowledged the child; the number of people to whom he had acknowledged the child; whether he provided for the child after it no longer resided with him; whether, if the child needed public benefits, he had pursued completion of the requisite paperwork; and whether his care was merely incidental. [Citations.]" (*T.R., supra*, 132 Cal.App.4th at p. 1211.)

"[R]eceipt of the child into the home must be *sufficiently unambiguous* as to constitute a clear declaration regarding the nature of the relationship, but it need not continue for any specific duration.… Although cohabitation for an extended duration may strengthen a claim for presumed parent status, [Family Code] section 7611[,] [subdivision] (d) does not require that cohabitation or coparenting continue for any particular period of time." (*Charisma R. v. Kristina S., supra*, 175 Cal.App.4th 361, 374, italics added.)

In *In re Sarah C.* (1992) 8 Cal.App.4th 964 (*Sarah C.*), the child was born after the mother and biological father had an affair while the mother was married to someone else. The biological father did not help the mother in any way during her pregnancy. After the child's birth, the mother named her husband as the child's father on the birth certificate so he would not know about the affair. The mother and her husband separated and the biological father, who was in the Navy, moved in with the mother and child for a few months. In the course of subsequent dependency proceedings, the court found he was only an alleged father. (*Id.* at pp. 969-970, 972-973.)

Sarah C. held the court's finding that he was not a presumed father was supported by substantial evidence. (*Sarah C., supra*, 8 Cal.App.4th at pp. 973.) While the biological father told a few family and friends that he was the child's father, he never told the mother's husband that he was the father, he did not try to place his name on the child's birth certificate, he never took formal steps to identify her to governmental agencies as his daughter, he never completed paperwork with the Navy to name the child as a dependent or beneficiary, he never provided a home for the child, he lived with the child and her mother for a brief time and only because he needed a place to stay, he provided little economic support, the mother's friends and her husband provided the primary financial support, and he made negligible efforts during and after he was imprisoned to contact her or establish a relationship with her. (*Id.* at pp. 972-973.) Such evidence showed that he did not "openly acknowledge" the child as his daughter "or receive her into his home," and he "only incidentally provided care" for the child during the brief period he lived with the mother. (*Id.* at p. 973.)

In *Spencer W.*, the alleged father lived with the mother at the time of the child's birth but not at the time of conception. The biological father's identity was not clear because the mother was a prostitute at the time of conception. The alleged father was present at the child's birth and lived with the child and the mother for two years. During that time, he told some people he was the father, the child called him "'daddy,'" and he cared for and disciplined the child. (*Spencer W., supra*, 48 Cal.App.4th at pp. 1650-1651.) The alleged father did not have his name placed on the birth certificate and he "'was equivocal in asserting his parental relationship'" while they lived together. (*Id.* at p. 1651.) When a social worker visited the apartment to investigate an incident when the child fell down, the alleged father specifically said he was not the child's father. He later testified that he denied paternity to avoid reducing the mother's welfare benefits. (*Ibid.*) The alleged father cared for the child for two months while the mother was incarcerated, but when the mother stopped receiving welfare payments during another period of

incarceration, he left the child with the mother's friend, who turned over the child to the maternal grandparents. While the child was with the grandparents, he did not take steps to claim paternity or provide financial support. When the mother was released, he helped the mother and child move to another residence. He was later arrested but showed no interest in pursuing his parental rights while he was in custody for two years, even though he knew there was a dependency matter pending and his friends were in contact with the mother. (*Id*. at pp. 1651-1652.)

Spencer W. held the alleged father failed to meet his burden of proof as to either foundational element to trigger the rebuttable presumption of being a presumed father. (*Spencer W., supra*, 48 Cal.App.4th at p. 1653.) *Spencer W.* held that while the alleged father "was required to receive [the child] into his home," the evidence showed he "did not receive the child into *his* home, but instead that mother permitted [the alleged father] to reside in *her* home, and that [his] residence with [the child] was not demonstrative of [his] commitment to the child but reflected that [he] acted out of personal convenience and self-interest." (*Ibid*., italics in original.) The mother paid for the apartment and most of their expenses when the alleged father lived with them, she supported the alleged father because he was unemployed, and he left them when she lost her welfare benefits. (*Ibid*.)

Spencer W. further held the alleged father's actions "as a whole, were not sufficient to satisfy the requirement that [he] '*openly and publicly* admit paternity.' [Citation.]" (*Spencer W., supra*, 48 Cal.App.4th at pp. 1653-1654, italics in original.) While the alleged father claimed paternity to family and friends, he was "unwilling to proclaim paternity when there might have been some cost to him (i.e., reduced AFDC payments)." (*Id*. at p. 1654.) He failed to take formal steps to place his name on the birth certificate, to establish paternity by legal action, to assume the financial obligations for child support, or assert his parental rights when the maternal grandparents denied access to the child. (*Ibid*.) Aside from a few telephone calls, the alleged father's "years in

prison were marked by an indifference toward establishing or maintaining a parental relationship" with the child. (*Ibid*.)

B. Analysis.

In the instant case, appellant argues he proved the foundational facts to be a presumed father because he received J1 and J2 in his home and openly and publicly held them out as his children. Appellant contends he started living with C.G., J1, and J2 in December 2008, he introduced the children to his family and friends, he helped care for the children and was involved in their daily lives, and he received them into his home and openly acknowledged them as his children. Appellant further contends that "[a]ny initial equivocation about his parentage was fleeting and the consequence of the on-going investigation of [C.G.] for welfare fraud."

Based on the extremely inconsistent and contradictory nature of the record, however, the juvenile court properly found that appellant failed to prove the foundational facts to establish that he was entitled to presumed father status. This absence of proof was the result of the multiple contradictory statements made by appellant and C.G. to family and friends, government officials, and under oath, about their relationship, living conditions, and the children's paternity, and appellant's failure to clear up the confusion at the evidentiary hearing.

As to the first foundational fact, appellant asserts he openly and publicly acknowledged J1 and J2 as his children in December 2008, when he introduced them to his parents and immediate family. Appellant claims his "short time equivocation" about his parentage was "an isolated factor", and once he was cleared of the criminal charges, "he quickly became an active parent in his sons' lives and introduced them" to his own family. As illustrated by the factual history of this case, however, appellant had numerous opportunities to openly and publicly hold out J1 and J2 as his children, but failed to tell his own family about the children until they were two and three years old. He admittedly never told H.R., the mother of his child A.S., that he was the father of J1

and J2, even though the children were born in the midst of the criminal charges arising from M.F.'s death and the dependency proceedings for A.S. J1 and J2 were born in 2005 and 2006, the criminal charges against appellant were dismissed in October 2007, he did not introduce the children to his family until December 2008, and he offered contradictory testimony as to when he actually reconciled with C.G. and become involved with the children.

More importantly, however, there is no evidence that appellant admitted his alleged paternity to anyone outside his immediate family. While appellant's name was on the lease for the Modesto residence, C.G. declared under penalty of perjury that he was just her cousin and his name was on the lease for credit purposes only. When the welfare fraud investigators arrived at the residence on the morning of May 20, 2009, appellant and C.G. repeatedly denied he was the father of any of her children. They continued to deny his parentage when the social workers spoke to them later that day, and only grudgingly changed their story.

C.G. also gave inconsistent statements as to whether appellant openly and publicly acknowledged his paternity of J1 and J2. When C.G. told the social workers that appellant was the children's father, she also said appellant refused to come to the hospital when J1 and J2 were born. In the parentage forms, appellant declared he was aware of C.G.'s pregnancies with J1 and J2 but he was not present at their births due to the circumstances of the criminal case. At the evidentiary hearing, C.G. testified she did not tell appellant she was pregnant with J1 or that he was the father, but she did tell him about her pregnancy with J2. C.G. also testified she did not give appellant the opportunity to come to the hospital when J1 and J2 were born and never told him where she was. C.G. denied telling the social workers that appellant refused to come to the hospital when the children were born.

As in *Spencer W.*, appellant was "unwilling to proclaim paternity when there might have been some cost to him," particularly during the criminal proceedings involving

M.F.'s death, the dependency proceedings for A.S., and the possible welfare fraud investigation of C.G. (*Spencer W., supra*, 48 Cal.App.4th at p. 1654.) Appellant's attempted explanations about these matters were inconsistent with his prior statements and completely undermined by the record.

As to the second foundational fact for presumed father status, there is no evidence that appellant ever received J1 and J2 into his home. Indeed, there is no substantial evidence to determine exactly where appellant was living from 2005 to 2009. The instant record states that appellant remained in a romantic relationship with H.R. during the criminal proceedings for M.F.'s death and the dependency matter for their own child, A.S., who was born in May 2005. J1 was born in October 2005, on the same day the court denied reunification services to appellant for A.S. In August 2006, C.G. gave birth to J2, just a few months after the court terminated appellant's parental rights to A.S. In September 2007, C.G. and appellant entered into the lease to live at the Modesto residence with J1, J2, and C.G.'s other children. In October 2007, the superior court dismissed the criminal charges filed against appellant for M.F.'s death.

Appellant asserts C.G. kept him away from J1 and J2 "earlier in their lives because he had (wrongfully it turns out) been accused of the murder of another child." "Understandably, she did not want appellant around her children if the charges were true, but once the charges were dismissed she welcomed appellant back into her life, and into her children's lives." [8]

There is no evidence, however, that appellant lived with C.G. and the children after the criminal charges were dismissed in October 2007. While the September 2007

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[8] As we have already noted, the instant record only reflects that the trial court dismissed the criminal charges against appellant. While the defense investigator obtained statements from witnesses who believed M.F.'s mother inflicted the child's injuries, there is no evidence as to the reason the court dismissed the charges aside from appellant's self-serving declarations.

lease for the Modesto residence stated that appellant and C.G. were living there, C.G. filed a statement under penalty of perjury in September 2008, and declared appellant was her cousin and he did not live at the Modesto residence.

The only undisputed fact is that appellant was at C.G.'s Modesto residence when the welfare fraud investigators arrived on the morning of May 20, 2009, but appellant and C.G. repeatedly told the investigators that appellant did not live there, he just spent the night, and C.G. did not even know his last name. Appellant gave a false name until the investigators advised him that they had his photograph. Appellant admitted his identity but claimed he lived with his parents in Riverbank. When the social workers arrived at C.G.'s house on the evening of May 20, 2009, appellant was still there, and appellant and C.G. again denied that he lived at the house. As the meeting continued, appellant and C.G. eventually stated he was the father of J1 and J2, but they continued to give contradictory accounts of appellant's involvement with the family and where he lived. When asked for contact information, appellant gave his parents' telephone number.

When the instant dependency proceedings began, appellant continued to make contradictory statements about whether he lived with C.G., J1, and J2, particularly when he filed separate parentage forms for J1 and J2. In J1's form, he wrote that C.G. and the children lived with an aunt in Livermore, his family visited the children when C.G. lived in Hayward, and he had been living full time with C.G. and J1 since March 2009. In J2's form, however, he wrote that he started living full time with C.G. and J2 in April 2009, and C.G. lived in Livermore prior to that time.

By the time of the September 2009 evidentiary hearing on appellant's paternity status, both appellant and C.G. had made wildly inconsistent statements as to whether appellant lived with and supported the children. The evidentiary hearing presented appellant with the opportunity to clarify the prior contradictory statements and carry his burden of proving the foundational facts for presumed father status, particularly as to whether he received them into his home.

Instead, the hearing testimony of appellant and his father merely added more layers to the mystery. Appellant testified he started living with C.G. and the children shortly before Christmas 2008, he never denied living with the family when the investigators and social workers arrived at the Modesto residence on May 20, 2009, and he continuously lived with the family from December 2008 to when the social workers made him leave that day. Appellant was confronted with his contradictory statements in the parentage forms, that he started to live with J1 in March 2009 and with J2 in April 2009. Appellant clarified he only moved his belongings into C.G.'s house in December 2008, and he didn't live there full time until April 2009, and that he lived on other people's couches prior to that time. Appellant failed to explain why J1's parentage form stated that he started living with the child in March 2009.

Appellant's father, Mr. S., added to the contradictions when he testified that he did not know whether appellant and C.G. lived together. Mr. S. testified appellant was living in Modesto with a friend named Ricky prior to May 2009, Mr. S. visited appellant in April or May 2009, but Mr. S. did not know the address. Mr. S. admitted he told a social worker in May 2009 that appellant was living with him in Riverbank at the time, but he also testified that appellant had not lived with him for about two and a half years.

There is thus no evidence that appellant carried his burden to prove the foundational fact that he received J1 and J2 into his home. Even if he moved into the Modesto residence by April 2009, the entirety of the record shows that it was C.G.'s house, since C.G. signed a form under penalty of perjury that appellant's name was on the lease simply so she could get credit. As in *Spencer W.*, there is no evidence that appellant ever received the children into *his* home. (*Spencer W., supra*, 48 Cal.App.4th at p. 1653.)

Appellant acknowledges there were "fabrications" in this case, but argues he cannot be denied presumed father status just because "he and the children's mother lied," and the "sole question" is whether he established his presumed father status. Appellant also asserts "that in spite of his and [C.G.'s] defensive misrepresentations, he clearly

made every possible effort to hold forth his sons as his own and is entitled to presumed father status." However, appellant cannot separate the "fabrications" from his inability to prove the foundational facts for presumed father status, and his alleged receipt of the children into his home was not "sufficiently unambiguous" to trigger to the presumption. (*Charisma R. v. Kristina S., supra,* 175 Cal.App.4th 361, 374.)

Appellant further argues that he distanced himself from C.G. and the children since J1 and J2 might have been removed from his custody because of the pending criminal charges arising from M.F.'s death, just as he lost his parental rights to A.S. when she was born in the midst of the criminal proceedings. Appellant asserts that his actions were those of a responsible parent given the circumstances. Even if appellant's premise was accepted, he never explained why he did not become involved with J1 and J2 when the criminal charges were dismissed in October 2007, why he waited until December 2008 to introduce them to his family, why he did not move in with C.G. and the children until either March 2009 (according to his paternity declaration for J1) or April 2009 (according to his hearing testimony and his paternity declaration for J2), and why he failed to use the evidentiary hearing to explain his contradictory statements and actions.

Appellant contends that it is in the best interests of J1 and J2 "to have a relationship with their biological father," and asserts "there was never a question whether he was the biological father" of J1 and J2. "'A biological or natural father is one whose biological paternity has been established, but who has not achieved presumed father status....' [Citation.]" (*In re J.L., supra,* 159 Cal.App.4th at p. 1018.) There is no evidence that DNA tests were conducted or that appellant was determined to be the biological father of J1 and J2.

Finally, appellant contends the court should have found he was a presumed father under *Kelsey S.* To qualify as a *Kelsey S.* father, the child's biological father must show that he promptly stepped forward to assume full parental responsibilities for the child's well-being, the child's mother thwarted his efforts to assume his parental responsibilities,

and that he demonstrated a willingness to assume full custody of the child. (*Kelsey S.*, *supra,* 1 Cal.4th at p. 849.) "If an unwed father promptly comes forward and demonstrates a full commitment to his parental responsibilities—emotional, financial, and otherwise—his federal constitutional right to due process prohibits the termination of his parental relationship absent a showing of his unfitness as a parent. Absent such a showing, the child's well-being is presumptively best served by continuation of the father's parental relationship. Similarly, when the father has come forward to grasp his parental responsibilities, his parental rights are entitled to equal protection as those of the mother." (*Ibid*., fn. omitted.)

We have already noted there is no evidence that appellant is the biological father of J1 and J2. Moreover, appellant completely fails to satisfy any of the standards required to be a *Kelsey S.* father for the same reasons that he was not a statutorily presumed father.

We thus conclude the court properly found appellant was not a statutorily presumed father because he failed to carry his burden of proving the foundational facts, and he was not a *Kelsey S.* father.

DISPOSITION

The judgment is affirmed.

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Poochigian, J.

WE CONCUR:

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Wiseman, Acting P.J.

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Cornell, J.